United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2110

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

ADRIAN CUEVAS,

Appellant.

Docket No. 74-2110

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT

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BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the excessive participation by the District Judge in the trial, which had the effect of assisting the prosecutor and rehabilitating government witnesses, resulted in a denial of a fair trial?

2. Whether the failure to warn appellant of his right to recant requires reversal of the judgment and dismissal of the indictment.

3. Whether the motivation for calling appellant to testify before the grand jury requires reversal of the judgment and dismissal of the indictment.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

On August 2, 1974, appellant was convicted of three counts of false swearing before a grand jury, in violation of 18 U.S.C. §1623. The trial was held in the United States District Court for the Eastern District of New York before The Honorable John R. Bartels and a jury. Appellant was sentenced to concurrent terms of three years, six months of which are to be served in prison, and two years and six months of which are to be served on probation, pursuant to 18 U.S.C. §3651. Appellant is on bail pending appeal.

This Court granted leave to appeal in forma pauperis, and The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was charged* with three counts of false swearing (18 U.S.C. §1623), allegedly committed in a December 19, 1972, appearance before a grand jury empaneled in the Eastern District of New York. The testimony which was the

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*The indictment is annexed as "B" to appellant's separate appendix.

which was the subject of the indictment consisted of appellant's denials of two conversations, one on February 24, 1972 (count one) and the other on March 22, 1972 (count two), concerning the sale of cocaine, and his denial of a March 22, 1972, transfer of a sample of cocaine (count three).* At no time during the grand jury testimony was appellant advised that he could recant his alleged false swearing.

At trial, conducted after a first trial had ended in a mistrial because the jury was unable to reach a verdict, the judge established himself as an active partisan. Through the transcript of the grand jury proceedings and the testimony of Elizabeth Ng (14-29**),*** the shorthand reporter who transcribed the grand jury minutes, the Government showed that appellant had, in fact, given the testimony which was the subject of the indictment. The grand jury testimony which was read to the jury revealed that appellant denied talking to anyone on either February 24 or March 22 about the sale of drugs, and further denied giving anyone a cocaine sample on March 22. However, the grand jury testimony concluded with two summariz-

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*The transcript of the grand jury testimony is annexed as "D" to appellant's separate appendix.

**Numerals in parentheses are references to pages of the trial transcript.

***The prosecutor asked Ng only fifteen questions, while the judge asked seven. First the judge ascertained that the witness actually remembered appellant (14), and then he assumed the prosecutor's job of establishing the authenticity of the minutes (19-20). He asked no questions on cross-examination.

ing questions and answers which inspired analysis by Judge Bartels. The testimony was:

> Q. Is it your testimony that you have never given anybody even a small amount of cocaine?
>
> A. No.
>
> Q. Is it your testimony that you never gave anybody on the evening of March 22, 1972, a small amount of cocaine wrapped in a dollar bill?
>
> A. No.
>
> (27).

The judge interjected:

> THE COURT: I suppose that means he didn't do it, "No." You understand, Mr. Gutman [defense counsel]?
>
> MR. GUTMAN: Yes, Judge.
>
> THE COURT: For instance, the testimony is, "Is it your testimony that you have never given anybody even a small amount of cocaine," the answer is "No." That would indicate that is not his testimony, but in fact it is his testimony: what he is saying is that he never gave anybody a small amount of cocaine. Do you agree with that?
>
> MR. GUTMAN: That's correct.
>
> THE COURT: That was true in a number of these answers, what he meant to say. He meant to say it was his testimony, but he is also saying he never did it.
>
> (27-28).

The remainder of the Government's case was directed to establishing that the testimony given was false. Toward

that end, the Government relied on the testimony of the police office with whom appellant had allegedly spoken about cocaine, surveillance officers, and chemists.

Charles Martinez, an officer with the New York City Police Department who had been assigned to the Drug Enforcement Administration Task Force (3A*) was the Government's key witness. During direct examination, conducted primarily by the judge (who asked thirty-eight questions to the prosecutor's nineteen), Martinez testified that on February 24, 1972, at the La Colena Bar at 3049 Third Avenue in the Bronx, appellant told him that he (appellant) could supply Martinez with all the cocaine he wanted but at that time the cocaine he had was a poor quality that would not take a "half cut" (4A-6A). Martinez further testified that on March 22, 1972, he met appellant again at La Colena, and this time they discussed the purchase of an eighth of a kilo of cocaine. According to Martinez, appellant said the price of this quantity of cocaine would be $2,000. Martinez offered appellant only $1,800, whereupon appellant left the bar, telling Martinez to wait there for him. Approximately one half hour later, when appellant returned, he motioned for Martinez to follow him to the men's room where, Martinez asserted, appellant gave him a folded one dollar bill containing "flake" -- cocaine -- which appellant said Martinez could have for $1,800. Appellant

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*Numerals in parentheses followed by "A" are references to pages of the trial transcript of the afternoon of May 20, 1974.

also gave Martinez a slip of paper on which was written a telephone number at which Martinez could contact him (11A-12A).

During the course of this testimony Judge Bartels' questions to Martinez were directed, inter alia, at circumventing defense counsel's objections. For example, when defense counsel objected to Martinez' qualifications to tell the jury what was meant by "cutting" the cocaine, the judge responded:

> THE COURT: I suppose he has had some experience. I will find out.
>
> Mr. Martinez, this was August 1972?
>
> THE WITNESS: February.
>
> THE COURT: You were then assigned to the Drug Task Force in August?
>
> THE WITNESS: Correct.
>
> THE COURT: Had you had any experience in dealing with sellers of drugs from August till February?
>
> THE WITNESS: Yes I did.
>
> THE COURT: Before that did you have any experience?
>
> THE WITNESS: No, I did not.
>
> THE COURT: What did that experience consist of -- buying drugs on behalf of the city as an undercover agent? Not selling, just buying?
>
> THE WITNESS: Correct.

THE COURT: Approximately how many transactions did you engage in between August, 1971, to February, 1972, if you can estimate?

THE WITNESS: I would say approximately just an estimate, about ten.

THE COURT: About ten and in the course of that were you able to tell just to what extent cocaine could be cut?

THE WITNESS: Well, yes.

THE COURT: Do you understand the language as used by the sellers of cocaine when they say "to be cut one eighth or one half" or that sort of thing?

THE WITNESS: Yes.

THE COURT: How did you learn what it meant?

THE WITNESS: From the other officers in the office when you first start.

We had discussions with the lab. They come down and give us courses on it.

THE COURT: What was the question?

(6A-7A).

Similarly, when defense counsel objected to the prosecutor's questions concerning ownership of La Colena, the judge took over this line of questioning (10A). When, in response to the judge's inquiry, Martinez conceded that he did not have personal knowledge that the bar was owned by appellant, the judge sought to establish control by asking

if appellant was even working as a bartender (14A).*

When Martinez asserted that appellant's February 24 price for cocaine was $500 an ounce, the judge interrupted to inquire as to the price for larger or smaller quantities, and asked further about their plans to meet at a later date:

> THE COURT: Would it make any difference if you bought a large or small quantity?
>
> THE WITNESS: Would it have made a difference?
>
> THE COURT: In the price. Five hundred dollars an ounce, that would be eight thousand dollars a pound.
>
> So, would it have made a difference if you bought a pound or an ounce?
>
> THE WITNESS: No.
>
> [THE PROSECUTOR] Q. Did you subsequently meet with Mr. Cuevas?

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* [THE PROSECUTOR] Q. Officer Martinez, do you have knowledge as to who owns the La Colena Bar and Restaurant?

[DEFENSE COUNSEL]: Objection, irrelevant.

THE COURT: Do you know? Did Mr. Cuevas ever tell you that he owned part of the bar?

THE WITNESS: I don't believe he did, your Honor.

THE COURT: Did you look up the records to find out whether he owned the bar?

THE WITNESS: No. That would be the case investigator....

(10A).

THE COURT: Wait a minute.

You had this conversation. Did it end?

THE WITNESS: It went into general conversation.

THE COURT: Did you tell him you would be back?

THE WITNESS: Yes, in about a week or so.

THE COURT: What did he say?

THE WITNESS: "Okay." He agreed on that.

THE COURT: Were you to meet him there?

THE WITNESS: I asked how I could get in touch with him and he told me to see him in about a week or so.

THE COURT: Where?

THE WITNESS: In the same place.

(9A).

On cross-examination,* defense counsel sought to impeach Martinez by establishing that he had been drinking during his indercover work. Martinez conceded that within less than an hour he had approximately four drinks on the night of February 24 (15A-16A). Judge Bartels then interrupted this line of questioning to ask Martinez what it was

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*Defense counsel asked 105 questions, while the judge asked twenty-one, many of which were directed at rehabilitation of the witness. See infra, at 10-11.

he was drinking* and to give him the opportunity to assert that although he ordered four drinks, he didn't drink them all (16A).

Using the text of Martinez' January 8, 1973, testimony before the grand jury, defense counsel sought further to impeach Martinez' credibility. In the grand jury, Martinez had referred to both the dollar bill with the cocaine and the note with the telephone number as "this exhibit," while at trial he had asserted that he had not seen either since his March 22 encounter with appellant**(24A-26A). After a side bar conference called by the Government,*** the judge questioned the witness as follows:

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*The answer was scotch and ginger ale.

**Martinez testified that it was his understanding that the narcotics and the note had been destroyed (23A-24A).

***At this conference the two Assistant United States Attorneys who were together prosecuting this case "explained" the practice of Federal narcotics officers:

> (Side bar discussion)
>
> THE COURT: Suddenly, this word "exhibit" appears.
>
> MR. WATSON: It is the practice of federal narcotics officers to refer to exhibits when testifying before the Grand Jury as to their designations in their file.
>
> MR. PASCARELLA: That reference to the exhibit is not a reference to a Grand Jury exhibit but to a former designation in the case file and report.
>
> There he refers to his exhibit 1 but the record shows there was no introduction

THE COURT: Well, let me ask this question:

As far as you are concerned, do you know whether in the files that would appear on narcotics, whether you mark certain documents as your own exhibits.

THE WITNESS: Usually anything that is narcotics is designated with a number. If it is not narcotics, we give it a letter.

THE COURT: That was -- somebody in your Bureau marked this as --

THE WITNESS: As exhibit 1.

THE COURT: But it wasn't marked before the Grand Jury as an exhibit?

THE WITNESS: I don't believe so, your Honor.

THE COURT: All right.

Redirect examination of the witness was again shared by the judge and the prosecutor. Nineteen questions were put by the prosecutor, and seventeen by the judge. When defense counsel objected to the prosecutor's questions concerning whether it was the practice of narcotics agents to bring

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of any evidence as a Grand Jury exhibit.

THE COURT: All right.

(Conclusion of side bar discussion)

(Following held in open court)

"exhibits" before the grand jury, the judge asked the question* (36A).

In contrast, on re-cross-examination, the judge's interruptions** of defense counsel's examination was not only sua sponte, but also thwarted effective cross-examination. When defense counsel inquired as to the "exhibit" marking procedure employed by Martinez, the judge took over the examination as follows:

> THE COURT: You have blank forms marked "exhibits, 1, 2, 3" --
>
> THE WITNESS: We have the blank forms and we put "exhibit 1" and describe it.

---

*Over defense counsel's objection, he also attempted to have the witness answer the prosecutor's questions concerning the closing of the case file, despite the witness' assertions that he didn't have that information:

> THE COURT: Well, I will let him ask the question despite the fact he doesn't know the exact date when the file was closed.
>
> Do you know the approximate date or within a reasonable time of the date that it was closed? Do you have any knowledge about the closing of the file?
>
> THE WITNESS: I just cannot --
>
> THE COURT: He doesn't know.
>
> (12).

**On re-cross, the judge asked twenty-two questions; defense counsel asked forty-five questions.

THE COURT: Then, the exhibit itself follows the description?

THE WITNESS: Yes.

THE COURT: Did you initial --

THE WITNESS: Yes.

THE COURT: Did you initial the exhibit which described the bill?

THE WITNESS: Yes.

THE COURT: And you initialed the exhibit that described the note with the phone number --

THE WITNESS: Correct, your Honor --

THE COURT (continuing): Of the La Colena; is that right?

THE WITNESS: That is correct, your Honor.

THE COURT: But you couldn't initial the cocaine.

THE WITNESS: Correct.

THE COURT: That was put away in an envelope?

THE WITNESS: We put that in a lock sealed envelope.

THE COURT: You didn't initial that envelope?

THE WITNESS: There is a possibility that I did also, yes.

THE COURT: All right.

When defense counsel tried to resume his questioning about this labeling procedure, the judge interrupted again and offered his own understanding of the procedure:

THE COURT: Mr. Gutman, I don't understand that it is done that way.

Is that the way it is done?

THE WITNESS: No.

THE COURT: They don't mark the so-called exhibit itself.

They have a sheet saying "exhibit 1" on it and they paste it on there.

(40A).

The inquiry between the Court and the witness as to this labeling process continued in great detail (41A-45A).

Finally, when defense counsel asked the witness how he could distinguish one narcotic exhibit from another that he had placed in the Bureau's safe, the judge answered the question (43A):

[DEFENSE COUNSEL] Q. Then, I'm going to ask you the Judge's question. If there were four sealed envelopes, how would you know that is the dollar bill, the one you got?

THE COURT: The initials date and description.

Ibid.

Next to testify for the Government was Detective Raymond Valley* of the New York City Police Department, assigned to the New York Joint Task Force (48A). He asserted**

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*Prior to Valley's testimony the judge, out of the jury's presence, was sharply critical of defense counsel's refusal to stipulate to the chain of custody of the drugs (97A).

**This time Judge Bartels asked thirteen questions to the prosecutor's twenty questions.

that on February 24, 1972, he saw Office Martinez enter the La Colena Bar and exit from it a half hour later. Valley was also stationed outside the bar on March 22, 1972, at which time he saw Martinez enter the bar. He testified that he then saw appellant leave the bar, drive away in a car, and return to the bar approximately a half hour later (50A-51A). Valley also testified that the case file was closed in May 1972, and that the exhibits were destroyed (54A). During this examination, the judge's questions were directed at getting the officer to repeat much of his testimony (51A) and to asking the witness, over defense counsel's objections, about the ownership of the bar (53A).

On cross-examination Valley admitted that his report of the February 24 surveillance was inaccurate in that it indicated the wrong address for La Colena (56A). In response to defense counsel's attempt to impeach the witness further with the statement in the report that asserted an attempt on February 24 to purchase "exhibit 1" when the supposed "exhibit 1" was not obtained until March 22, Judge Bartels interrupted with the following interrogation:

> THE COURT: Isn't exhibit 1 the dollar bill?
>
> THE WITNESS: Yes sir but that wasn't collected until March, a month later.
>
> THE COURT: I see. This is February and on that you wrote a note stating there was an attempt to purchase exhibit 1.

THE WITNESS: Yes sir.

THE COURT: But you didn't have exhibit 1.

THE WITNESS: No. The purpose of being there was to attempt to purchase exhibit 1.

THE COURT: Then that's true in every attempted purchase you have whether it is here or elsewhere or in Brooklyn.

If you don't succeed you always refer to it as an attempt to purchase exhibit 1, exhibit 1 being some quantity of narcotics. Is that true -- regardless that it may never come about?

THE WITNESS: Yes.

THE COURT: Is that your testimony?

THE WITNESS: Yes.

THE COURT: So, exhibit 1 is quite a common identification as far as you people are concerned.

THE WITNESS: Yes, it is procedure.

THE COURT: Well, it may turn out to be an exhibit and it may not. It may not be anything. It only becomes something if purchased and then it becomes a real exhibit 1.

What you are really saying is an attempt to purchase what might be called exhibit 1 if purcahsed.

THE WITNESS: Yes.

(57A-58A).

Similarly, the judge interrupted when Valley was confronted with the facts that his March 22 report indicated

that the cocaine obtained weighed two-tenths of a gram:

A. Yes, but I overlooked the point two grams. The dot was placed in the wrong place.

Q. You claim that is a mistake?

A. Yes. The dot should not have been in there.

Q. What was it?

A. Two grams.

THE COURT: A dot in the wrong place?

MR. GUTMAN: Well, Judge, two grams and two tenths of a gram -- that's some difference.

THE COURT: No, no, no.

Let's see that.

(Document handed to Court)

THE COURT: If we are talking about a dot -- where should the dot have been?

I don't know anything about grams of cocaine.

MR. GUTMAN: Neither do I, but apparently he does.

THE WITNESS: The dot should have been after the two or it should have been without a dot at all but the dot made it two tenths.

THE COURT: It was two grams?

THE WITNESS: Yes.

Q. How did you know it was two grams?

A. The evidence was transported

to the Task Force office where we have our own equipment to weigh and process the evidence.

Q. And it was weighed in your presence?

THE COURT: He didn't say that.

The preceding witness, I think, testified as to that.[*]

MR. GUTMAN: I am asking this witness.

(93A-94A).

Finally, Judge Bartels' intervention undermined defense counsel's ability through the use of a chart and photographs to establish that the surveillance was unreliable because the view of La Colena was obstructed by an elevated train, and because the street was darkened by the el and was wide and heavily trafficked. For example, the witness had conceded that the chart of the Third Avenue location was, with the exception of the direction in which the elevator steps were facing, a fair and accurate representation. However, when the judge, sua sponte, cautioned the witness that he did not have to respond to defense counsel's further questions until the chart was admitted into evidence, the prosecutor was inspired to object to its admission (61A-62A) and the witness changed his testimony and asserted that the chart

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*The judge's re-assertion of the witness' testimony as he remembered it occurred throughout the trial. See, for example, 65A, 90A, 99A.

was inaccurate.*

The same scenario occurred when defense counsel attempted to introduce the photographs. First the witness agreed they were a fair and accurate representation of the locale, but, after the judge's intervention, changed his mind:

> Q. Patrolman, do those pictures fairly represent the area?
>
> * * *
>
> THE WITNESS: ... I would like to state that the photographs are a fair representation of the area but I'd like to make a note that I consider these pictures poor quality.
>
> MR. GUTMAN: I object to that. He is not a photographic expert.
>
> THE WITNESS: Being that they are dark and some are not clear at all.
>
> THE COURT: I think under those circumstances his testimony is that it is not a fair representation of this area taking into consideration the factors of light and dark.
>
> THE WITNESS: Correct.
>
> THE COURT: Of course. That's the whole story here.
>
> (70A-71A).

---

*When defense counsel argued that Valley had testified that the chart was accurate, the prosecutor responded that he didn't think it was. Judge Bartels asked the prosecutor if he wanted a voir dire:

> THE COURT: I'm inviting you to find out. Come up and ask questions.
>
> (63A).

(See also 88A-89A).

When the prosecutor -- this time, Mr. Pascarella as opposed to Mr. Walton -- was moved by the judge's involvement to object to the introduction of the photographs, the judge cautioned him, in the presence of the jury:

> ... [N]ow let's not throw any dust in the air. You know why you have two assistants here. Let's not give the impression that you are two against one.
>
> (96A).

None of the photographs were admitted into evidence.

On re-direct examination in response to defense counsel's objection and to aid the prosecutor in establishing that Valley had accurately identified appellant as the man who left the bar, the Court explained that the purpose of the prosecutor's questions as to prior opportunity to observe appellant:

> THE COURT: I think he is just trying to establish the fact that Valley knew Mr. Cuevas or can identify him on the date of March 22, or prior.
>
> I don't think we are interested in Danty's Bar [where Valley said he saw appellant] but it is important for identification.[*]
>
> (113A).

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*Throughout the trial it was the judge who questioned each of the witnesses as to their identification of appellant (14, 5A, 49A, 5B).

Finally, distressed at Valley's concession that he was fifty or sixty feet away from appellant when the latter left and then subsequently entered the bar, the following inquiry by the judge ended the prosecutor's re-direct examination:

> THE COURT: Oh, you were not parked then, directly behind him?
>
> THE WITNESS: Oh, no sir.
>
> THE COURT: So, you were 60 feet away?
>
> THE WITNESS: Oh, yes sir.
>
> THE COURT: When he came out?
>
> THE WITNESS: Yes sir.
>
> THE COURT: Now, when he came back, how far -- you say he drove right past you?
>
> THE WITNESS: Yes sir.
>
> THE COURT: And you were then 60 feet away?
>
> THE WITNESS: Sixty feet, approximately ten feet more than before.
>
> THE COURT: This is a little difficult for me to understand.
>
> How could you see him 60 feet away? He drives past you and you could see him?
>
> * * *
>
> But you didn't know who drove the car?
>
> THE WITNESS: He drove right by me.

THE COURT: How far was he when he drove right by you after he returned? Not 60 feet, I don't assume.

THE WITNESS: No, maybe ten fe --.

THE COURT: That's what I thought you said before.

(114A-115A).

James Harris was the second surveillance officer to testify* for the Government, and his testimony in essence dovetailed with Valley's, although Harris did concede that he couldn't see appellant clearly (13B**). Again, the judge chose to interfere at critical times: when, for example, the witness seemingly contradicted himself as to how close he was to appellant when he observed him -- once saying, eight feet, and then twenty feet -- the judge quickly assumed the responsibility of questioning the witness in an attempt to resolve the conflict (10B).

So, too, on cross-examination,*** when counsel sought to impeach the reliability of Harris' report, the judge, sua sponte, jumped to the witness' assistance:

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*The prosecutor asked twenty-six questions, the judge thirteen.

**Numerals in parentheses followed by "B" refer to the trial transcript of May 21, 1974.

***On cross-examination it was established that despite Harris' testimony on direct that March 22 was a clear sunny day, the Weather Bureau report indicated rain (16B) and further that Harris' report, like Valley's, misreported the address of the building they allegedly had under surveillance (19B).

Q [by Defense Counsel]: Did you ever see the cocaine?

A. No sir, just reference to another report, that is all it is.

Q. In other words, you took down his information?

A. Normal course of business, when I write a surveillance report of an undercover activity, I refer to his undercover report.

Q. You use his words, his facts, his data?

THE COURT: Let him answer.

THE WITNESS: Anybody reading this will know that this report is about.

Q. That it's two grams.

A. Whoever read it.

Q. It's not your fact?

THE COURT: He didn't say that.

(28B).

Michael Elliot testified for the Government to establish that on the night of March 22, 1972, he saw Martinez exit from La Colena. Martinez met Elliot, gave him the folded one dollar bill, and the note (35B-36B). Once again the judge actively participated in the direct examination,* causing Elliot to repeat his testimony and detail it, thereby strengthening it (36B-37B). Finally, not only was it the judge who

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*This time the judge and the prosecutor asked an equal number of questions, nineteen.

asked the requisite predicate questions to enable admission of Elliot's report as a business record (38B), when the prosecutor terminated his questions because Elliot said he did not remember how much the drugs weighed, it was the judge who picked up the gauntlet and tried to refresh Elliot's recollection (39B-41B).*

The Government's last two witnesses were two government chemists, Jack Fassanello and Phillip V. Porto, who testified, respectively, that the white substance in the dollar bill was cocaine (50B),** and that, upon authorization, the drugs were destroyed on June 14, 1972 (58B-59B). The judge's questions to Fassanello, which numbered ten,*** elicited the critical information about the analysis the chemist performed (49B-50B),**** and further reminded Fassanello when he forgot that the white powder was contained in a dollar bill (57B).*****

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*At the close of cross-examination, during which the judge asked one question to defense counsel's forty-four, the judge attempted to diffuse the effect of counsel's cross-examination of Harris by asking Elliot if he remembered if it rained on March 22, 1972 (46B-47B). Predictably, Elliot did not remember rain.

**On cross-examination it was established that the amount of cocaine present was .04 grams (53B).

***The prosecutor asked twenty.

****In contrast to his leniency in allowing the prosecutor to go over ground he had already covered (50B), the judge twice interrupted cross-examination to ask defense counsel if he wasn't wasting time (55B-56B).

*****Similarly, the judge's questions to Porto, also ten in number, were directed at eliciting the critical aspects of his testimony and admitting the form authorizing the destruction of the drugs into evidence (60B-61B).

At the conclusion of the Government's case, defense counsel moved for a judgment of acquittal. When the motion was denied, the defense rested. Twice during the course of counsel's summation the judge, sua sponte, interrupted either to qualify what counsel was arguing (76B) or to correct it (79B). There was no such interruption of the prosecutor's summation. In contrast, when defense counsel objected (92B) to certain inaccuracies in Mr. Watson's argument, the judge told Mr. Watson out of the hearing of the jury to correct it himself (94B).

After deliberation, the jury convicted appellant of all three counts (127B).

POINT I

THE TRIAL JUDGE'S EXCESSIVE PARTICIPATION IN THE TRIAL, HIS CONSTANT ASSISTANCE TO THE PROSECUTOR, AND HIS REHABILITATION OF GOVERNMENT WITNESSES, DESTROYED THE IMPARTIAL AND JUDICIOUS ATMOSPHERE IN THE COURTROOM, AND CONSEQUENTLY DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL.

It is essential in a criminal trial that the District Court Judge convey to the jury his impartiality to and detachment from the partisans before him. United States v. Marzano, 149 F.2d 923, 926 (2d Cir. 1945). This "total neutrality" (United States v. Bursten, 396 F.2d 976, 980 (5th Cir. 1968)), on the part of the judge is the foundation of the "impartial judicious atmosphere" (United States v. Brandt, 196 F.2d 653, 655 (2d Cir. 1952)), necessary to the fair trial to which an accused is entitled. United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973); United States v. Cassiagnol, 420 F.2d 868 (4th Cir. 1970).

In contrast to this unequivocal standard, the two-day trial in this case was the prototype of overzealous and prejudicial judicial intrusion. Throughout the trial there was active participation by the judge in the examination of witnesses for the Government, eager rehabilitation

of those Government witnesses impeached on cross-examination, and an insidious attempt on the part of the judge to extract from the witnesses evidence the Court believed would convict appellant. By these actions, the judge improperly aided the part of the prosecuting attorney (United States v. Guertler, 147 F.2d 796 (2d Cir.), cert. denied, 325 U.S. 879(1945)), making it virtually impossible for the jury to make the distinction between prosecutor and judge. His run-away participation in the Government's case surely conveyed to the jury that the Court believed in the defendant's guilt. This conduct and its necessary results require reversal. United States v. Nazzaro, supra, 372 F.2d at 303; United States v. Musgrave, 444 F.2d 755 (5th Cir. 1971); United States v. Langram, 416 F.2d 1140 (5th Cir. 1960); United States v. Brusten, supra, 395 F.2d 976; United States v. De Sisto, 289, F.2d 833(2d Cir. 1961).

1. The extent of the judge's participation was improper.

The extent of the judge's involvement in the prosecution of the case, in essence relegating both Assistant United States Attorneys to the position of the judge's asistants is the framework within which to evaluate improper judicial participation in a criminal trial. United States

v. Fernandez, 480 F.2d 726 (2d Cir. 1973); United States v. Nazzaro, supra, 472 F.2d 302; United States v. DeSisto, supra, 289 F.2d at 834; United States v. Brandt, supra, 196 F.2d 663.

Officer Charles Martinez was the Government's key witness since he was the only participant in the alleged drug conversations and transfer. On direct examination the judge asked thirty-eight questions exactly twice the number asked by the Assistant United States Attorney; on cross-examination defense counsel asked 105 questions while Judge Bartels asked only twenty-one. This pattern continued during re-direct and re-cross examination: the judge asked seventeen questions to the prosecutor's nineteen but only twenty-two questions to defense counsel's forty-five. Similarly, the judge asked more than one half the number of questions asked by the prosecutor during Vallely's* and Harris' testimony and the same ratio appears as well in the direct examination of the chemists, Fassanello and Porto.**

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* Although Judge Bartels did ask a substantial number of questions of Vallely on cross-examination, much of it was directed at rehabilitation. See infra at 34

** During Michael Elliot's testimony the ratio increased to one to one, both the judge and the prosecutor asking nineteen questions each.

While there were, of course, instances when Judge Bartel's participation might have been for purposes of clarification (United States v. Cassiagnol, supra, 420 F.2d 896; United States v. De Sisto, supra, 289 F.2d at 834), this rationale will not justify many points of intervention, nor will it excuse, in the circumstances of this trial, his wholesale involvement in the Government's case. United States v. Nazzaro, supra, 472 F.2d at 301, citing United States v. D'Anna, 450 F.2d 1201, 1206 (2d Cir. 1971). The record establishes that the two Assistant United States Attorneys who tried this case together and defense counsel were all competent to do their jobs, thus making minimal the legitimate need for judicial intervention. United States v. Nazzaro, supra, 472 F.2d at 302; United States v. Wyatt, 442 F.2d 858 (D.C. Cir. 1971); United States v. Juenbergh, 431 F.2d 1062 (2d Cir. 1970); United States v. De Sisto, supra, 289 F.2d at 833.

However, even if the judge believed the performances were deficient, it was not for him to compensate, as this Court recently held in United States v. Fernandez, supra, 480 F.2d at 737:

> " . . . Even if the judge thinks the performance of the Assistant United States Attorney has been inadequate . . . it is not his business to step in; there is too much danger that the jury will regard him as associated with the prosecution and be swayed accordingly. As Judge

> Learned Hand observed in United States v. Marzano, 149 F.2d 923, 926 (2d Cir. 1974), while the judge may examine witnesses, or occasionally even call them, 'he must not enter the lists'. See also Jackson v. United States, 117 U.S. App. D.C. 325, 329 F.2d 893, 894 (1964)."

A closer look at some of the specific instances of Judge Bartels' participation only reconfirms that he exhibited an unmistakable bias in favor of the Government.*

> 2. The judge, by the substance and persistance of his questions, communicated to the jury that he believed appellant was guilty.

The judge's partisan attitude and his determination to influence the result of the trial in favor of a judgment of conviction - the first trial having ended when the jury could not reach a verdict - was readily apparent from the outset of the trial. When the minutes of the pertinent grand jury testimony revealed an ambiguity in the last two questions asked to appellant and consequently in the answers given, the judge, on his own, resolved the inconsistancy.

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* It is irrelevant that this bias might not have been motivated by partisan purpose. The harm is done by the appearance of such purpose. United States v. Nazzaro, supra, 472 F.2d at 310; United States v. Curcio, 279 F.2d 681, 682 (2d Cir. 1960).

The grand jury testimony revealed that appellant denied both discussions on the sale of cocaine and an actual transfer of a small amount on March 22, 1972. However, when asked by the prosecutor at the end of his inquiry before the grand jury:

> Is it your testimony that you have never given anybody even a small amount of cocaine?

and:

> Is it your testimony that you never gave anybody on the evening of March 22, 1972, a small amount of cocaine wrapped in a dollar bill?

appellant answered "No" to both questions.*

Perceiving that a literal understanding of these questions and answers would mean that appellant was denying his earlier testimony, or perhaps had a change of heart, the judge sought to preclude that analysis by interpreting, for the jury, appellant's response:

> " . . . [the answer] would indicate that is not his testimony, but in fact it is his testimony; what he is saying is that he never gave anybody a small amount of cocaine."

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* He also responded "No" to an earlier similar question:

> Is it your testimony that you never dealt with cocaine in any way, or that you never handed anybody any cocaine?

In a trial on a charge of false swearing, where the critical testimony includes ambiguous questions and answers, not only is it shocking that the judge would take it upon himself to resolve the issue, it is simply impermissible to permit him to do so. Bronston v. United States, 409 U.S. 352 (1973). As the Supreme Court held in reversing Bronston's conviction for perjury (18 U.S.C. §1621):

> "Precise questioning is imperative as a predicate for the offense of perjury."

Because the substance of the last two questions asked of appellant summarized all that had preceded them, the negative response gave rise to the argument that the alleged perjurious testimony was too equivocal to sustain a guilty verdict. Regardless of the judge's assumptions as to what the thrust of the defense would be, it was improper for him to preclude this as a defense alternative, and the judge's decision to do just that is indicative of his attitude toward this case.

That same attitude was later revealed in an incident that began out of the presence of the jury. The judge

chastized defense counsel for refusing to stipulate to the chain of custody of the cocaine appellant allegedly gave to Martinez. The judge's expressed annoyance was clearly calculated to cow defense counsel into agreeing to stipulate to this fact, despite the necessity of having to dismiss the third count of false swearing if the Government could not prove that the substance received by Martinez from appellant was cocaine. When the judge failed to convince counsel to stipulate to the chain of possession he commented several times that counsel's examination as to chain of custody was a waste of time.

In this context of predilection for the prosecution, the judge's truly extraordinary participation in the Government's case including his in-court warning to the two prosecutor's not to give the jury the impression that it was two against one,* assumes even greater significance. Although the prosecutor did ask some questions, in virtually every instance, it was Judge Bartels who elicited the essential factual elements necessary to establish the Government's case. For example, it was Judge Bartels who made cer-

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* In fact a reading of the entire transcript of the trial gives the unmistakeable impression that it was three against one.

tain that the grand jury reporter, Officer Martinez and both Vallely and Harris identified appellant in ourt. Moreover, it was Judge Bartels' inquiry of these three police witnesses that set out, in detail, the facts intended to contradict appellant's assertions before the grand jury.*

Even if the substance of each of the judge's questions was not separately improper, the thrust of all of them was that the judge believed that the appellant had committed the acts charged and was guilty.

3. Rehabilitation of Government witnesses.

As though co-operation in the making of the Government's case were not sufficient, the judge did what the prosecutor could not do. The judge provided information to rehabilitate impeached Government witnesses in the midst of cross-examination by the defense.

The effect of this intrusion was clearly critical to the outcome of the case. Since appellant had been granted immunity in the grand jury before being required to testify,

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* Further fostering the clear impression that the prosecutors and the judge were on the same side was the pattern that developed when defense counsel objected to the prosecutor's questions: without ruling on the objection, the judge would simply ask the questions himself. See, for example: 6A-&a, 10A, 35A, 36A, 37A, 53A, 113A.)

there was no reason for him to lie to the grand jury about the events of February and March, 1972. Moreover, the Government could present only one witness to establish that appellant's denials of any drug transactions were false. In essence, the case was a credibility contest between Charles Martinez and appellant. When defense counsel had begun to make inroads into Officer Martinez's reliability the judge immediately came to the wtiness' rescue. For example, Martinez was challenged with the inconsistancy between his trial testimony, that he had not seen the dollar bill and the cocaine since March 22, 1972, and his January 8, 1973, grand jury testimony in which he referred to the drugs an "exhibit 1." The Court interrupted and by use of leading questions, extracted from the witness the explanation that it was the practice of the Bureau of Narcotics to label evidence as exhibits upon receipt and that Martinez' reference before the grand jury was to that exhibit number.

Similarly, the identical tactic of instant rehabilitation occurred when defense counsel through his cross-examination began to undermine the validity of the labeling

process for the cocaine. Counsel clearly entertained the reasonable and proper expectation that he could thus establish a break in the chain of custody between the substance allegedly given Martinez and the substance eventually analyzed. Instead, Judge Bartels set about to thwart this effort by shoring-up Martinez' testimony. Again through leading questions the judge sought to explain to the jury how the dollar and the cocaine had been marked and carefully identified. Moreover, this time the judge's involvement extended to his offering his own understanding of how the evidence was labeled in response to counsel's questions. When defense counsel asked the witness how he could distinguish one narcotic exhibit that had been placed in the Bureau safe from another, it was the judge who responded that the agent could tell by the initials, the date, and the description on the exhibit.

This pattern, so destructive of the defense, continued through Vallely's testimony. The thrust of cross-examination was to damage that credibility by establishing inaccuracies in both Vallely's observation and his reporting. Toward that end counsel exposed that in Vallely's February 24th

report he had referred to an attempt to purchase "exhibit 1" when all the testimony established that there was no "exhibit 1" until March 22nd. This inspired an examination by Judge Bartels which best captures the devotion the judge displayed throughout the trial to the Government's case:

> THE COURT: Isn't exhibit 1 the dollar bill?
>
> THE WITNESS: Yes sir but that wasn't collected until March, a month later.
>
> THE COURT: I see. This is February and on that you wrote a note stating there was an attempt to purchase exhibit 1.
>
> THE WITNESS: Yes sir.
>
> THE COURT: But you didn't have exhibit 1.
>
> THE WITNESS: No. The purpose of being there was to attempt to purchase exhibit 1.
>
> THE COURT: Then that's true in every attempted purchase you have whether it is here or elsewhere or in Brooklyn.
>
> If you don't succeed you always refer to it as an attempt to purchase exhibit 1, exhibit 1 being some quantity of narcotics. Is that true -- regardless that it may never come about?
>
> THE WITNESS: Yes.
>
> THE COURT: Is that your testimony?
>
> THE WITNESS: Yes.
>
> THE COURT: So, exhibit 1 is quite a common identification as far as you people are concerned.

THE WITNESS: Yes, it is procedure.

THE COURT: Well, it may turn out to be an exhibit and it may not. It may not be anything. It only becomes something if purchased and then it becomes a real exhibit 1.

What you are really saying is an attempt to purchase what might be called exhibit 1 if purcahsed.

THE WITNFSS: Yes.

Other examples of judicial rehabilitation during cross-examination appear in the later testimony of Vallely (93A-94A), of Officer Harris ( ), and Detective Elliot (46-7).

The influence of a trial judge's opinion or bias on a jury is necessarily great. Starr v. United States, 153 U.S. 619, 626 (1894). When that opinion is as constant and pervasive as it was during this two-day trial, it becomes, as it did here, the determinative factor in the outcome of the proceedings. United States v. Fernandez, supra; United States v. Mazzaro, supra; United States v. DeSisto, supra. Moreover, the traditional charge that the "comments of the judge are not to be construed as the court's opinion" and that "the jurors alone are to decide" will not suffice to counteract the wholesale errors. United States v. Guglielmini, 389 F.2d 602 (2d Cir. 1967); United States v. Brandt,

supra. Nor does the absence of objection, which appellate courts have recognized is difficult to make (United States v. Hill, 332 F.2d 105 (7th Cir. 1964); Adler v. United States, 182 F.2d 464, 472 (5th Cir. 1910)), erase the veritable plethora of errors in the trial below. United States v. Grunberger, supra, 431 F.2d 1062; United States v. Wyatt, supra, 442 F.2d 858; United States v. Reed, 421 F.2d 190 (5th Cir. 1964). The only remedy is a reversal of the conviction and a remand for a new trial. United States v. Fernandez, supra; United States v. Navarro, supra, 472 F.2d at 313; United States v. Grunberger, supra; United States v. DeSisto, supra; United States v. Arnault, supra.

POINT II

THE FAILURE OF THE PROSECUTOR TO ADVISE APPELLANT OF HIS RIGHT TO RECANT REQUIRES REVERSAL OF THE JUDGMENT AND DISMISSAL OF THE INDICTMENT.

Appellant was indicted for three counts of false swearing in his December 19, 1972, testimony before a grand jury in violation of 18 U.S.C. §1623. Subsection(d) of §1623 provides in pertinent part:

> "Where, in the same continuous court, or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration

> has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

Although the prosecutor who interrogated appellant before the grand jury was careful to warn him that if he lied he would be prosecuted for perjury, appellant was never told that he could avoid prosecution by recanting. The failure to advise appellant of this factor requires reversal. United States v. Lardieri, 497 F.2d 317 (3d Cir. 1974).

Calling a witness before the grand jury is to enable the prosecutor to secure the truth, not to lay a foundation for a perjury prosecution. Bronston v. United States, supra, 409 U.S. at 352; United States v. Lardieri, supra, 497 F.2d at 320. The recantation provision of §1623 was added to the statute to effect this end: to provide an incentive to a witness, and an aid in the truth-determining process:

> "The recantation provision, modeled after the New York Penal Statute is to serve as an inducement to the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk of prosecution by doing so.
>
> (2 U.S. Code Congress and Administrative News 4023-4 (1970).

Clearly, the recantation provision cannot have its intended effect if the witness does not know of its existence. Special significance attaches to the provision where, as here, the witness knows that if he has lied he is subject to a penalty for false swearing; without a comparable understanding that he can escape that penalty by recanting, the likelihood is that he will continue in the perjury as a means of self-protection.

In this case the transcript of the grand jury proceeding makes plain that the prosecutor believed at the time he was asking the questions that appellant was not responding truthfully.* This belief alone should have inspired the warning to appellant that he could have recanted. Moreover, the literal interpretation of appellant's negative response to the prosecutor's last two questions** indicates that appellant might have been willing, if he understood, to recant. If that is so, the prosecutor's failure to afford him that opportunity was improper and mandates a dismissal of the indictment.

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* See appendix "D"

** See Appellant's Brief at 4.

POINT III

THE IMPROPER MOTIVATION FOR CALLING APPELLANT AS A WITNESS BEFORE THE GRAND JURY REQUIRES REVERSAL OF THE JUDGMENT.

All that appears in the record of this case indicates that appellant was summoned to the grand jury for the primary purpose of getting him to commit perjury. Since, as indicated, the purpose of bringing a witness before the grand jury is to enable the Government to obtain the truth about certain facts necessary to a proper investigation (Bronston v. United States, supra, 409 U.S. at 352), the record here shows it does not appear that this was a proper investigation.

Appellant was called to testify before a grand jury empaneled in the Eastern District of New York. However, the crime about which the Government was so interested occurred completely within Bronx County, specifically at 3049 Third Avenue. Thus, there was no venue in the Eastern District. (Brown v. United States, 245 F.2d 549 (8th Cir. 1957)).* Further, the crime involved only the transfer of four hundredths of a gram (.04) of cocaine**. What is more, the file of the case had been closed some sever months prior to the grand jury appearance, and the drugs had been destroyed.

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* Relying on Brown, defense counsel moved for a judgment of acquittal.

** There could be no conspiracy charged since, according to the Government's theory of the case, the discussions occurred only with a police officer.

Recently, the Court of Appeals for the Fifth Circuit on facts similar to those present in this case, found that the Government had improperly used the grand jury to entrap the witness. United States v. Mandujana, 496 F.2d 1050, 1054-5 (5th Cir. 1974). That appellant had been informed in general terms that the grand jury was investigating drug transactions "up and down the eastern seaboard"*did not transform this into a proper investigation. In fact, the questions asked by the prosecutor belie that contention since appellant was asked questions only about the Bronx cocaine business, almost exclusively his Bronx encounter with Officer Martinez. See United States v. Mandujano, supra, 496 F.2d at 1055.

The record here indicates that appellant was called before the grand jury to attempt to get him to commit perjury. Such perversion of the grand jury processes mandates reversal of this conviction for perjury and dismissal of the indictment. Brown v. United States, supra, 245 F.2d at 554-556; United States v. Icardi, 140 F. Supp.383 (D.C.D.C.1956).

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* This occurred in November, 1972, appearance docketed and made part of the record on appeal.

CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed and the indictment dismissed.

Respectfully submitted,

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Certificate of Service

Dec 2, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

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